BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-263-E - ORDER NO. 2021-680

OCTOBER 12, 2021

IN RE:	Cherokee County Cogeneration Partners, LLC, Complainant/Petitioner v. Duke Energy Progress, LLC and Duke Energy Carolinas, LLC, Defendant/Respondent	) ORDER DENYING) PETITIONS FOR) REHEARING OR) RECONSIDERATION) AND PROVIDING) CLARIFICATION

I. Introduction

The Commission issued Order No. 2021-604 on August 27, 2021, to resolve Docket No. 2020-263-E, the Complaint of Petitioner, Cherokee County Cogeneration Partners, LLC (Cherokee), against Respondent, Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC). Cherokee had filed its complaint asserting DEC/DEP refused to negotiate a power purchase agreement (PPA) with Cherokee in good faith to succeed the previously executed 2012 PPA. The Commission ruled Cherokee established a legally enforceable obligation (LEO) with DEC on September 17, 2018, and the Commission directed the parties to use the avoided cost rate in effect at the time the LEO was established (September 17, 2018, or the time of the intended delivery, January 1, 2021) at the election of Cherokee. The Commission also directed DEC to file a petition for a true-up to address any overage customers paid since January 1, 2021, under the former PPA terms. After the Commission issued Order No. 2021-604, Cherokee and DEC/DEP

filed petitions for rehearing or reconsideration of the order. The petitions for rehearing or reconsideration filed by both Cherokee and DEC/DEP are denied.

II. Facts and Procedural History

The facts leading up to the issuance of Order No. 2021-604, filed on August 27, 2021, are set forth in that order. Following issuance of the order, Cherokee elected to pursue an agreement with DEC based upon the establishment of a LEO on September 17, 2018. *See* Notice Regarding Legally Enforceable Obligation Election, filed by Cherokee on September 7, 2021. DEC/DEP and Cherokee then filed petitions for rehearing or reconsideration of Order No. 2021-604; Cherokee responded to DEC/DEP's petition; DEC/DEP responded to Cherokee's petition; and ORS filed correspondence regarding Cherokee's election and the petitions for reconsideration. DEC/DEP and Cherokee also filed correspondence addressing the status of the 2012 PPA, and Cherokee filed correspondence indicating the parties "are not in a position to 'execute any successor PPA'" as anticipated in Order No. 2021-604 until the Commission can provide clarification of its order. (Cherokee correspondence dated September 27, 2021.)

In its petition for reconsideration, Cherokee asks the Commission to reconsider its ruling because "the parties may not agree with respect to an appropriate negotiated payment mechanism, or what the 'avoided cost rate approved and determined by the Commission which existed' was on September 17, 2018 (the date Cherokee established its LEO)." (Cherokee Petition, p. 3). Cherokee asks the Commission to "determine that in light of the substantial testimony and related calculations submitted by Cherokee through its testimony and evidence in this proceeding, 'the avoided cost rate for this facility shall be the $110 per

kW amount, though if start[-]up costs are reimbursed separately, as they are in the 2012 Agreement, the rate would be $90 per kW-year.'" (*Id.*)

DEC/DEP, in response to Cherokee's petition, asserts the amount Cherokee argues is the approved avoided cost is "well in excess of DEC's actual avoided costs as of September 2018 and would result in customer overpayment." (DEC/DEP Response, p. 2). DEC/DEP argues it included in its Hearing Exhibit 14, corrected late filed exhibit 1, (LFE 1), its avoided cost rates as of October 2018 for a 10-year, dispatchable tolling PPA, calculated using methodology and inputs from September 2018—"a $34.97/kW-year energy rate and a $15.10/kW-year capacity rate for a combined $50.06/kW-year total avoided cost rate." (*Id.*) Furthermore, DEC/DEP states: "The rates presented in Corrected LFE 1 were calculated using the *same* methodology later approved by the Commission in Order No. 2019-881(A)." (DEC/DEP Response, p. 3). DEC/DEP also explained "[a]ny perceived difference in the rate is the result of converting the 5-year "must-take" rates to the 10-year dispatchable tolling structure that the Parties have agreed to adopt in the new PPA." (*Id.*)

DEC/DEP also contends, in response to Cherokee's petition, the Commission's order was not sufficient to resolve the issues in the docket because there was not a Commission approved methodology for large qualifying facilities on September 17, 2018. "Absent a then-existing Commission-approved methodology appliable to large QFs, the September 2018 avoided cost rates presented in Corrected LFE 1 were calculated using the same methodology the Commission approved after extensive review in Order No. 2019-881(A)." (DEC/DEP Response, p. 4).

In DEC/DEP's own petition for reconsideration, DEC/DEP asks the Commission to (1) reconsider its finding Cherokee established a LEO with DEC on September 17, 2018, and (2) clarify "regardless of the LEO date, DEC should use an avoided cost methodology that is consistent with the methodology determined and approved by the Commission in Order No. 2019-881(A)." (DEC/DEP Petition, p. 1). DEC/DEP asserts that "without further clarity . . . the Parties lack sufficient direction to resolve their chief remaining dispute—the appropriate methodology by which to calculate avoided cost rates." (DEC/DEP Petition, p. 2). DEC/DEP asserts "no such Commission-approved methodology existed in September 2018" because there was no approved methodology for large qualifying facilities, but only a requirement in Order No. 2016-349 the utilities "negotiate with QFs that were not eligible for the standard offer consistent with PURPA and FERC's implementing regulations," but the order "did *not* approve a specific methodology."[1] (DEC/DEP Petition, p. 2).

DEC/DEP also makes a number of additional assertions in the petition. The companies argue Cherokee did not establish a LEO because Cherokee was free to walk away from its offer and did so by making an offer to DEP a few months later. DEC/DEP asserts the Commission's order did not address the fact that Cherokee sent a letter to DEP asserting a LEO in December of 2018. (Duke Petition, p. 4). DEC/DEP further contends the order failed to address *Pacolet River Power Co., Inc. v. Duke Power Co.* in which the

[1] Order No. 2016-349, issued on May 12, 2016, specifically states: "All rates for QFs above two MW, or otherwise ineligible for the standard tariffs, shall be negotiated under the Public Utility Regulatory Policies Act of 1978 and the Federal Energy Regulatory Commission's implementing regulations." (Order No. 2016-349, pages 1-2.)

Commission found the QF did not create a LEO because the QF "was free to walk away from the negotiations."[2]

The companies additionally assert the order failed to address "whether a LEO extends indefinitely or whether a QF must take action to execute a PPA within a reasonable time limit to preserve its right." (DEC/DEP Petition, p. 6). DEC/DEP argues the order "misinterprets" the time of delivery as January 1, 2021, contending that "time of delivery" under FERC's regulations "grants QFs the right to be paid a variable rate based on avoided costs calculated throughout the term of the contract or obligation at the time energy is delivered." (*Id.*) DEC/DEP argues the Commission should clearly state in its order the decision is based "on the unique set of facts and circumstances of this case and its determination should not have precedential impact." (DEC/DEP Petition, p. 8). DEC/DEP states that while Cherokee witness Strunk "argued that the Commission 'implicitly' accepted a calculation methodology" in Order No. 2016-349, Strunk later testified the order did not "dictate a methodology," but directed utilities "to negotiate rates with large QFs." (DEC/DEP Petition, p. 9). DEC/DEP asserts the order failed to address the "first year of capacity need principle" and contends "Cherokee's claim to entitlement for full capacity payments remains the most significant dispute between the parties, and the Commission's Order does not provide sufficiently clear guidance to resolve the issue." (DEC/DEP Petition, pp. 9-11). The companies also assert the Commission should order the parties to use the avoided cost rates calculated using the methodology approved in Order No. 2019-881(A). (DEC/DEP Petition, p. 11). Finally, DEC/DEP contends the order failed to

[2] The facts and evidence before the Commission in Docket No. 95-1202-E, which resulted in Order No. 2001-663, are distinguishable from the facts and evidence presented in this docket.

"determine that the avoided cost rates proposed by Cherokee would exceed DEC's avoided cost." (*Id.*)[3]

III. Procedure for Petitions for Rehearing or Reconsideration before the Commission

Section 58-27-2150 of the South Carolina Code of Laws (2015) establishes that any party to a proceeding, within ten days of an order, may petition the Commission for a rehearing of that order. The Commission must respond within twenty days and may "grant or refuse" the petition.

> After an order or decision has been made by the Commission any party to the proceedings may within ten days after service of notice of the entry of the order or decision apply for a rehearing in respect to any matter determined in such proceedings and specified in the application for rehearing, and the Commission may, in case it appears to be proper, grant and hold such rehearing. The Commission shall either grant or refuse an application for rehearing within twenty days, and a failure by the Commission to act upon such application within that period shall be deemed a refusal thereof. If the application be granted the Commission's order shall be deemed vacated, and the Commission shall enter a new order after the rehearing has been concluded.

Regulation 103-825 sets forth the petitions that a party may file to the Commission and the elements of a petition for rehearing and the form. S.C. Code Ann. Regs. 103-825 (2012). "Petitions may be submitted to the Commission for any relief, other than for an adjustment of rates and charges, which the Commission is empowered to grant under its statutory authority. Petitions which may be filed include . . . Petition for Rehearing or

[3] The Commission provided a ruling to resolve Docket No. 2020-263-E pursuant to federal and state law in Order No. 2021-604, and denies the petitions for rehearing, with clarification, in this docket.

Reconsideration . . . ." (*Id.*) "A Petition for Rehearing or Reconsideration shall set forth clearly and concisely: (a) The factual and legal issues forming the basis for the petition; (b) The alleged error or errors in the Commission order; (c) The statutory provision or other authority upon which the petition is based." S.C. Code Ann. Regs. 103-190(4).

IV. Denial of Petitions and Clarification of Avoided Cost Rate

In Order No. 2021-604, the Commission found "Cherokee established a legally enforceable obligation (LEO) with [DEC] on September 17, 2018, to sell its power at [DEC's] avoided cost rate approved and determined by the Commission which existed on the date of the obligation." (Order, p. 34). Further, the Commission found "DEC is required under PURPA to buy power from Cherokee at its avoided cost rate calculated using the methodology approved by the Commission as of the date the legal[ly] enforceable obligation was established or as of the date of delivery of power." (*Id.*). In the alternative, the Commission found "PURPA and Commission rules allow the parties to negotiate an agreement if Cherokee chooses not to continue to assert its rights to a LEO established on September 17, 2018." (Order, p. 36). Cherokee elected to pursue a PPA based on avoided cost rates established on the date the obligation was established, September 17, 2018, pursuant to 18 C.F.R. § 292.304(d).

The Commission concluded as a matter of law: "Cherokee, as QF establishing a legally enforceable obligation, has the choice to be paid at the avoided cost rates of DEC calculated using the Commission approved methodology existing on the date the obligation incurred, or at avoided cost rates of DEC calculated using the Commission approved methodology existing at the time of delivery pursuant to 18 C.F.R. § 292.304(d)." The Commission ordered: "DEC is required to purchase Cherokee's power at its avoided cost

rate methodology on the date Cherokee chooses pursuant to the legally enforceable obligation it established on September 17, 2018, under 18 C.F.R. § 292.304(d), which is e[i]ther the date of the legally enforceable obligation of September 17, 2018 or the date of delivery which is January 1, 2021."

Order No. 2021-604 found, pursuant to PURPA, Cherokee established a LEO with DEC and could elect whether to claim DEC's avoided cost rates as of the date of the obligation, or as of the date of the delivery, or the parties could choose to negotiate a successor agreement. Cherokee chose to pursue an agreement at DEC's avoided cost rates as of the date of the obligation, September 17, 2018. We directed the parties to use the avoided cost rate and methodologies approved by the Commission on the date the LEO was established, September 17, 2018, consistent with PURPA.

Having reviewed the petitions of the parties, we find no reason to grant the petitions to rehear or to reconsider the order. The order made findings and conclusions supported by the evidence and consistent with federal and state law. The order constituted the Commission's response to the pleadings and evidence filed in this docket. By way of clarification, however, we direct the parties to DEC and DEP's Late Filed Exhibit No. 1, later Corrected Late Filed Exhibit No. 1, designated as Hearing Exhibit 14, which sets out DEC's avoided cost rate. Hearing Exhibit 14 is based on evidence in the record from DEC which calculated the avoided cost rate in accordance with the provisions of PURPA and applicable law existing at the time Cherokee established its LEO with DEC, pursuant to a ten-year, dispatchable tolling agreement, the form and term of which Cherokee and DEC/DEP agreed.

We further clarify Order No. 2021-604 addresses the facts in this docket. It is recognized by the Commission that the exact specifics of this docket are unique given that the Federal Energy Regulatory Commission (FERC) made changes for the first time in 2020 after approximately forty (40) years since the Public Utility Regulatory Policies Act or PURPA was enacted. Now there is change in how PURPA will be implemented as a result of FERC Order No. 872 and its clarifying Order No. 872-A. FERC continues to give states discretion in Order Nos. 872 and 872-A, even though FERC rules must be followed by state commissions.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Justin T. Williams, Chairman
Public Service Commission of
South Carolina